Supreme Court, U.S.
FILED
05116 MAR 1 - 2006
OFFICE OF THE CLERK

No. 05-

In the Supreme Court of the United States

NEW CINGULAR WIRELESS SERVICES, INC., F/K/A AT&T WIRELESS SERVICES, INC.,

Petitioner,

v.

WILLIAM BUCY,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Five

PETITION FOR A WRIT OF CERTIORARI

DONALD M. FALK
Mayer, Brown, Rowe & Maw LLP
Two Palo Alto Square
Suite 300
Palo Alto, CA 94306
(650) 331-2030

KENNETH S. GELLER
Counsel of Record
EVAN M. TAGER
ARCHIS A. PARASHARAMI
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

This petition presents the same questions that are presented in *Cingular Wireless LLC v. Mendoza*, No. 05-1119. They are:

1. Whether the Federal Arbitration Act preempts a state-law rule conditioning the enforcement of an arbitration provision on the defendant's amenability to class arbitration.

2. Whether the Federal Arbitration Act preempts a state-law rule that claims seeking injunctions on behalf of the general public are non-arbitrable.

CORPORATE DISCLOSURE STATEMENT

Petitioner New Cingular Wireless Services, Inc. (formerly known as AT&T Wireless Services, Inc.) is wholly owned by Cingular Wireless LLC. Cingular Wireless LLC has no parent company. It is indirectly owned by AT&T Inc. (the result of the acquisition of AT&T Corp. by SBC Communications, Inc.) and BellSouth Corporation, which are the only publicly held corporations with a 10% or more ownership interest in Cingular Wireless LLC.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 4

CONCLUSION 6

TABLE OF AUTHORITIES

Page(s)

CASES

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995) 2

Broughton v. Cigna Healthplans of California,
988 P.2d 67 (Cal. 1999) 3, 4

Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003) 1

Cruz v. PacifiCare Health Systems, Inc.,
66 P.3d 1157 (Cal. 2003) 3, 4

Discover Bank v. Superior Court,
113 P.3d 1100 (Cal. 2005) 3, 4

Doctor's Assocs., Inc. v. Casarotto,
517 U.S. 681 (1996) 1, 2

Perry v. Thomas, 482 U.S. 483 (1987) 1

Southland Corp. v. Keating, 465 U.S. 1 (1984) 1, 4

CONSTITUTIONS, STATUTES, AND RULES

U.S. Const. Art. VI, cl. 2 2

9 U.S.C. § 2 2

28 U.S.C. § 1257 1

Cal. Bus. & Prof. Code §§ 17200 *et seq.* 2

Cal. Bus. & Prof. Code §§ 17500 *et seq.* 2

Cal. Civ. Code §§ 1750 *et seq.* 3

PETITION FOR A WRIT OF CERTIORARI

Petitioner New Cingular Wireless Services, Inc. (formerly known as AT&T Wireless Services, Inc.) respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California.[1]

OPINIONS BELOW

The Court of Appeal's opinion after transfer (App., *infra*, 1a-12a) is unreported. The order of the California Supreme Court denying review (App., *infra*, 13a) is unreported. The order of the Superior Court denying AT&T Wireless's motion to compel arbitration (App., *infra*, 14a-16a) is unreported. The original decision of the Court of Appeal reversing the Superior Court's order (App., *infra*, 17a-32a) is unreported. The order of the California Supreme Court granting review of the Court of Appeal's original decision and instructing the Court of Appeal to reconsider its decision (App., *infra*, 33a) is unreported.

JURISDICTION

The judgment of the Court of Appeal was entered on September 30, 2005. The California Supreme Court denied AT&T Wireless's timely filed petition for review on December 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. Although the Court of Appeal's judgment affirming the denial of AT&T Wireless's motion to compel arbitration is interlocutory, this Court has jurisdiction to review such judgments. See, *e.g.*, *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984); *Perry v. Thomas*, 482 U.S. 483, 489 n.7 (1987); see also *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (granting certiorari and reversing interlocutory ruling refusing to enforce arbitration provision without addressing jurisdiction); *Doctor's Assocs., Inc. v. Casarotto*, 517

[1] We will refer to petitioner as AT&T Wireless.

U.S. 681 (1996) (same); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (same).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, clause 2 (the Supremacy Clause) of the United States Constitution provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract.

STATEMENT

Petitioner AT&T Wireless is now part of Cingular Wireless LLC, which is the nation's largest wireless service provider, with over 50 million customers, several million of whom are California residents. When AT&T Wireless's customers obtained wireless service, they entered into standard wireless service agreements that contained arbitration provisions.

Notwithstanding his obligation to arbitrate disputes, respondent William Bucy and two co-plaintiffs filed a lawsuit raising claims under California's Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code §§ 17200 *et seq.*) and false advertising law (*id.* §§ 17500 *et seq.*) as well as common-law claims against AT&T Wireless, Cingular, and another wire-

less service provider. App., *infra*, 1a-3a.[2] Bucy challenges AT&T Wireless's "Regulatory Programs Fee," which "included a fee for local number portability." *Id.* at 3a. AT&T Wireless moved to compel arbitration based on Bucy's arbitration agreement. *Id.*

The superior court denied the motion, holding both that AT&T Wireless did not prove the existence of Bucy's arbitration agreement and that the alleged agreement was unconscionable because it prohibited class arbitration. App., *infra*, 15a.

The Court of Appeal reversed, holding that AT&T Wireless had met its burden of proving the existence of an arbitration agreement and that the prohibition of class arbitration was not unconscionable. App., *infra*, 20a-31a. The court noted, however, that Bucy's claims for public injunctive relief are non-arbitrable under *Broughton v. Cigna Healthplans of California*, 988 P.2d 67 (Cal. 1999) and *Cruz v. PacifiCare Health Systems, Inc.*, 66 P.3d 1157 (Cal. 2003), which held that public injunctive claims under, respectively, the California Consumer Legal Remedies Act (Cal. Civ. Code §§ 1750 *et seq.*) and the UCL and false advertising law cannot be arbitrated. App., *infra*, 30a n.6. See also 05-1119 Pet. at 4-5.

AT&T Wireless petitioned for review to request that the California Supreme Court reconsider its opinions in *Broughton* and *Cruz*. Though Bucy did not petition for review, the California Supreme Court granted review and transferred the case back to the Court of Appeal with instructions to vacate its opinion and reconsider in light of *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005). App., *infra*, 33a.

---

[2] Bucy's co-plaintiff, Jaime Wing, made claims against Cingular. App., *infra*, 14a. We are concurrently filing a separate protective petition for certiorari in *Cingular Wireless LLC v. Wing*, No. 05-___.

In *Discover Bank*, the California Supreme Court held that class-action waivers are substantively unconscionable "when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." 113 P.3d at 1110. As set forth more fully in our petition for certiorari in *Mendoza*, the court also rejected several arguments raised by Discover Bank and its amici that the FAA preempted its unconscionability holding. See 05-1119 Pet. at 5-6.

After receiving supplemental briefs, the Court of Appeal filed a new opinion on September 30, 2005. Over AT&T Wireless's preemption arguments, the court then proceeded to hold that, under *Discover Bank*, the prohibition against class arbitration in AT&T Wireless's arbitration provision is substantively unconscionable because (i) it is found in a contract of adhesion, (ii) respondent's claims are small, and (iii) respondent alleges that AT&T Wireless engaged in unlawful practices. App., *infra*, 7a-10a.

AT&T Wireless filed a petition for review in the California Supreme Court arguing that (i) the Court of Appeal had misconstrued *Discover Bank*; (ii) the FAA preempts the Court of Appeal's holding that AT&T Wireless's prohibition against class arbitration is unconscionable; and (iii) *Broughton* and *Cruz* cannot be squared with this Court's precedents and should be overruled. The California Supreme Court denied review on December 14, 2005, without comment. App., *infra*, 13a.

REASONS FOR GRANTING THE PETITION

The issues presented in this case are identical to the ones presented in *Cingular Wireless LLC v. Mendoza*, No. 05-1119. First, the petition raises the question left open by this Court in *Southland Corp. v. Keating*, 465 U.S. 1 (1984):

whether the FAA preempts a state-law rule conditioning the enforcement of an arbitration provision on the defendant's amenability to class arbitration. Second, the petition presents the question whether the FAA preempts a state-law rule that claims for injunctions that would benefit the general public are non-arbitrable.

Both of these questions were answered in the negative by the courts of California. Together, these two holdings threaten to be the death knell for tens of millions of arbitration agreements in California.

In our petition for a writ of certiorari in *Mendoza*, we submit that (1) there is a conflict between the courts of California and other state and federal courts on each of the questions presented; (2) the issues presented are of great importance and warrant this Court's review; and (3) the California courts are on the wrong side of each issue.[3] Those arguments apply with equal force here.

Because the issues presented in this case are the same as those presented in *Mendoza*, the outcome of *Mendoza* should determine the outcome here. Accordingly, it would be appropriate for the Court to hold this case pending the disposition of the petition for a writ of certiorari in *Mendoza*.

---

[3] We are supplying respondent's counsel with a copy of our petition in *Mendoza*.

CONCLUSION

The petition for a writ of certiorari should be held for disposition in light of *Cingular Wireless LLC v. Mendoza*, No. 05-1119.

Respectfully submitted.

DONALD M. FALK
Mayer, Brown, Rowe & Maw LLP
Two Palo Alto Square
Suite 300
Palo Alto, CA 94306
(650) 331-2030

KENNETH S. GELLER
Counsel of Record
EVAN M. TAGER
ARCHIS A. PARASHARAMI
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

MARCH 2006

APPENDIX

APPENDIX TABLE OF CONTENTS

Page

Opinion of the California Court of Appeal, First District, Division 5 (Sept. 30, 2005) 1a-12a

Order of the Supreme Court of California (Dec. 14, 2005) 13a

Order of the Superior Court of California, County of San Mateo, Denying Motions to Compel Arbitration and for Stay (Mar. 12, 2004) 14a-16a

Opinion of the California Court of Appeal, First District, Division 5 (May 18, 2005) 17a-32a

Order of the Supreme Court of California (Aug. 24, 2005) 33a

Court of Appeal,
First District, Division 5, California.

WILLIAM BUCY,
Plaintiff and Respondent,

v.

AT&T WIRELESS SERVICES, INC.,
Defendant and Appellant.

No. A105910.

(San Mateo County Super. Ct. No. 432021).

Sept. 30, 2005.

Bruce Lee Simon, Cotchett & Pitre, Burlingame, CA, for Plaintiff-Respondent.

Daniel Erin Jackson, Keker & Van Nest, San Francisco, CA, for Defendant-Appellant.

JONES, P.J.

Plaintiff William Bucy and two coplaintiffs filed suit against AT&T Wireless and other wireless service providers to challenge the practice of charging customers a fee for local number portability. Of the three named plaintiffs, only Bucy is a customer of AT&T Wireless. AT&T Wireless petitioned to compel arbitration of plaintiff Bucy's claims based upon an arbitration clause included among the terms and conditions of the wireless service agreement.[1] AT&T Wireless appeals from the order denying arbitration.

---

[1] The plaintiffs' lawsuit named two other wireless service providers as well, but this appeal concerns only AT&T Wireless. AT&T sought to compel arbitration only by plaintiff Bucy because Bucy is the only named plaintiff who is an AT&T Wireless customer.

We initially reversed the trial court's order, but the Supreme Court has remanded this matter to us for reconsideration in light of the recent decision in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover Bank*). Upon reconsideration, we conclude that the arbitration clause at issue here prohibiting class-wide arbitration is unconscionable and unenforceable. We will remand for the trial court's determination whether the ban on class arbitration should be severed from the arbitration agreement so as to allow arbitration to go forward on a class basis.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff first became a subscriber of AT&T Wireless Services, Inc., (AT&T Wireless) in October 2001 when AT&T Wireless acquired his account from Bay Area Cellular Telephone Corporation (dba Cellular 1). At that time plaintiff was sent a Welcome Guide that contained that the terms and conditions of AT&T Wireless's wireless service. After 2001 Bucy changed his rate plan several times, most recently in March 2003, when he entered into a one-year service agreement subject to a new set of written terms and conditions.

The terms and conditions of the wireless service agreement include an arbitration clause calling for the arbitration of all disputes arising out of "our relationship." Notwithstanding the agreement to arbitrate all disputes, the customer retains the right to bring an action in small claims court, and both parties may litigate debt collection matters.

The arbitration clause allows only individual claims to be heard in arbitration. The provision states: "An arbitrator ... may not order relief on a consolidated, class wide, or representative basis." Further, the arbitration clause provides: "[A]ny arbitration will be conducted on an individual basis and not on a consolidated, class wide, or representative basis."

The arbitration agreement sets up a three-tiered system for allocation of costs. If the customer's claim is for less than $1,000, the customer must pay a fee of $25, and AT&T Wireless will pay the balance of administrative fees and costs. If the customer's claim is between $1,000 and $75,000, then the customer must share in the costs of arbitration, but need pay no more than the equivalent court filing fee. And, if the claim is in excess of $75,000, then all administrative costs and expenses will be divided equally.

In April 2003, AT&T Wireless began charging its customers a "Regulatory Cost Programs Fee" that included a fee for local number portability, even though a portability program had never been implemented. In June 2003, plaintiff Bucy and his two coplaintiffs brought a class action alleging unfair business practices under the Unfair Competition Law (UCL) (Bus. & Prof.Code, § 17200 et seq.), violations of the False Advertising Act (Bus. & Prof.Code, § 17500 et seq.), fraud, breach of contract, and breach of the implied covenant of good faith and fair dealing.

Based upon the arbitration clause in its wireless service agreement, AT&T Wireless petitioned to compel arbitration of plaintiff Bucy's claim. Plaintiff opposed the petition, arguing that the arbitration clause was procedurally and substantively unconscionable. Plaintiff also questioned the existence of an arbitration agreement, asserting that he had never signed any written contract with Cellular 1 containing an arbitration clause and he was not alerted to the arbitration clause in the Welcome Guide from AT&T Wireless.

The trial court identified two reasons for denying AT&T's petition to compel arbitration. First, the court found that AT&T Wireless failed to prove an agreement to arbitrate. Second, the court found that even if an arbitration agreement exists the agreement is unconscionable. In particular, the court found the arbitration agreement procedurally unconscionable, having been presented on a take-it-or-leave-

it basis. Further, the court found the ban on classwide arbitration to be substantively unconscionable.

DISCUSSION

I. Existence of Arbitration Agreement

An order compelling arbitration is warranted only upon a finding that "an agreement to arbitrate the controversy exists." (Code Civ. Proc., § 1281.2.) General principles concerning the formation of a contract govern this threshold issue. (*Marcus & Millichamp Real Estate Investment Brokerage Co. v. Hock Investment Co.* (1998) 68 Cal.App.4th 83, 88-89.) The appellate court will uphold the trial court's finding on the existence of an arbitration agreement when substantial evidence supports that finding. (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 357.) However, when, as here, the evidence consists entirely of written declarations and documentary evidence, we make a de novo determination of whether the parties agreed to arbitrate their disputes. (68 Cal.App.4th at p. 89.) We conclude that an agreement to arbitrate exists.

The evidence was undisputed that Bucy entered into an agreement with AT&T Wireless for the provision of wireless service. Bucy admitted in his complaint that he is a customer of AT&T Wireless, and he admitted in his declaration that he had filled out a form when he signed up for service with Cellular 1, which was later taken over by AT&T Wireless. The complaint expressly alleges that plaintiffs "*entered into written contracts* with Defendants wherein Defendants promised to provide wireless telephone service to Plaintiffs ... in exchange for ... a monthly fee. Each of these contracts were form adhesion contracts which included the same material terms." (Italics added.) Indeed, the causes of action for breach of contract and breach of implied covenant of good faith rest upon the existence of a contract.

AT&T Wireless presented as evidence a copy of the written "Terms and Conditions" for Bucy's most recent wireless service agreement. Plaintiff does not dispute that the terms and conditions include an arbitration clause. Plaintiff contends that he never assented to those terms and conditions.

Certainly a contract is not formed without mutual assent. (Civ.Code, §§ 1550, 1565; *Windsor Mills, Inc. v. Collins & Aikman Corp.* (1972) 25 Cal.App.3d 987, 993.) However, the existence of mutual assent is determined by objective criteria, not by one party's subjective intent. The test is whether a reasonable person would, from the conduct of the parties, conclude there was a mutual agreement. (*Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1050.)

This is not a case in which the contractual nature of the document was not obvious to an unsuspecting customer. (Cf. *Windsor Mills, Inc. v. Collins & Aikman Corp., supra*, 25 Cal.App.3d at pp. 993-994.) The opening paragraph of the terms and conditions states: "Get the most out of your wireless service by knowing the terms of your Agreement with us. PLEASE READ THESE TERMS AND CONDITIONS CAREFULLY. They govern the relationship between you and AT&T Wireless and explain our respective legal rights concerning all aspects of our relationship, including ...:[¶] Resolution of past or future disputes by arbitration instead of court trials and class actions." (Capitalization in original.) The document goes on to state in all capital letters that by using the wireless service "you consent to the terms and conditions set forth in this agreement. If you do not agree with these terms and conditions ... do not use the service or device and notify us immediately to cancel service and/or return the equipment...."

Plaintiff acknowledged in his complaint that the terms and conditions packet was part of the wireless service agreement. The complaint alleges that, "The section of the 'Terms

and Conditions' to the [AT&T] service contract yields no mention of the Regulatory Programs Fee." His only evidence to refute the binding effect of those terms and conditions was his declaration: "I do not believe I got a contract from AT&T [in October 2001] when they started to provide my wireless service." Whether or not Bucy recognized the welcome guide he was sent in 2001 as a "contract" is irrelevant in light of the uncontroverted evidence that Bucy entered into a new contract in March 2003 subject to the terms and conditions. Those terms and conditions give the customer 15 days in which to review the terms and cancel the agreement. Plaintiff obviously continued to use the wireless service after March 2003; according to the complaint filed in June 2003, he remains an AT&T Wireless customer.

Certainly the wireless service agreement was a contract of adhesion—a standardized contract imposed upon the subscriber without any opportunity to negotiate the terms. (See generally, *Neal v. State Farm Ins. Co.* (1961) 188 Cal.App.2d 690, 694; accord *Armendariz v. Foundation Health PsychCare Services, Inc.* (2000) 24 Cal.4th 83, 113 (*Armendariz*); *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 817.) However, a contract of adhesion is nonetheless a valid and existing contract. (*Graham v. Scissor-Tail, Inc., supra*, 28 Cal.3d at p. 819; *Allan v. Snow Summit Inc.* (1996) 51 Cal.App.4th 1358, 1375; *Yeng Sue Chow v. Levi Strauss & Co.* (1975) 49 Cal.App.3d 315, 325.) Such contracts "are, of course, a familiar part of the modern legal landscape.... They are also an inevitable fact of life for all citizens—businessman and consumer alike." (*Graham v. Scissor-Tail, Inc., supra*, 28 Cal.3d at pp. 817-818.) A finding of adhesion merely begins another inquiry—whether a particular provision within the contract should be denied enforcement on the ground that it is unconscionable. (*Id.* at pp. 819-827; see *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc., supra*, 89 Cal.App.4th at p. 1056; *California*

Grocers Assn. v. Bank of America (1994) 22 Cal.App.4th 205, 214.)

II. Unconscionability

An agreement to arbitrate is valid, irrevocable, and enforceable except when grounds exist for the revocation of any contract. (Code Civ. Proc., §§ 1281, 1281.2, subd. (b).)[2] Unconscionability is one ground upon which a court may refuse to enforce a contract (Civ.Code, § 1670.5), and the burden is on the party opposing arbitration to prove the defense. (*Engalla v. Permanente Medical Group, Inc., supra,* 15 Cal.4th at p. 972.)

The determination of unconscionability is a question of law for the court. (Civ.Code, § 1670.5, subd. (a); *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 851.) On appeal, when the extrinsic evidence is undisputed, as it is here, we review the contract de novo to determine unconscionability. (93 Cal.App.4th at p. 851; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1527.)

In determining whether a particular contractual provision is unconscionable, we examine both a procedural and a substantive element of unconscionability. The *procedural* element focuses on the way in which the disputed provision was presented—i.e., whether there was "oppression" or "surprise." Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them. The *sub-*

---

[2] The statutory reference to grounds for revocation of an agreement is a misnomer; the issue on a motion to compel arbitration is whether there are grounds to *rescind* the arbitration agreement. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973.)

stantive element of unconscionability has to do with the effects of the contractual provision and whether it is overly harsh or one-sided. (*Armendariz, supra*, 24 Cal.4th at p. 114; *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486.)

To be unenforceable, a contract must be both procedurally and substantively unconscionable, but the courts employ a "sliding scale" or a balancing relationship between the two elements of unconscionability, such that the greater the degree of unfair surprise or unequal bargaining power, the less the degree of substantive unconscionability required to annul the contract and vice versa. (*Armendariz, supra*, 24 Cal.4th at p. 114; *Marin Storage & Trucking, Inc. v. Benco, supra*, 89 Cal.App.4th at p. 1056.)

The terms and conditions of the wireless service agreement here were presented on a take-it-or-leave-it basis, first mailed to plaintiff as a Welcome Guide and then provided as a packet accompanying his new wireless service contract. We agree with the trial court's conclusion that the wireless service agreement was a contract of adhesion and, hence, procedurally unconscionable. (See *Flores v. Transamerica HomeFirst, Inc., supra*, 93 Cal.App.4th at p. 853; *Stirlen v. Supercuts, Inc., supra*, 51 Cal.App.4th at pp. 1533-1534.) The more difficult question is whether the arbitration clause banning class-wide relief is substantively unconscionable.

That question was recently examined by our Supreme Court in *Discover Bank*, where the court focused on the exemption that a contract clause banning class action or class arbitration relief may provide to an offending business from liability for its bad business practices. The court said: "[C]lass action waivers found in [adhesive] contracts may also be substantively unconscionable inasmuch as they may operate effectively as exculpatory clauses that are contrary to public policy. As stated in Civil Code section 1668: 'All contracts *which have for their object, directly or indirectly, to*

exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.' (Italics added.)" (*Discover Bank, supra*, 36 Cal.4th at p. 161.)

While recognizing that class action and class arbitration waivers are not, in the abstract, exculpatory clauses, the court commented that such clauses are "indisputably one-sided." (*Discover Bank, supra*, 36 Cal.4th at p. 161.) The court expressly rejected the notion that provisions in the arbitration agreement allowing litigation in small claims court or recovery of attorney fees by the prevailing party are adequate substitutes for the important mechanism of class-wide arbitration. (*Id.* at p. 162.)

The Supreme Court concluded as follows: "We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' (Civ.Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced." (*Discover Bank, supra*, 36 Cal.4th at pp. 162-163.)

In the present case, the class arbitration ban appears in a consumer contract for wireless telephone service, a setting expected to involve small amounts of damages. Indeed, the Regulatory Program Fee is alleged to be $1.75 per month. The issue we face is whether the complaint here alleges "*a*

scheme to deliberately cheat large numbers of consumers out of individually small sums of money." (*Discover Bank, supra*, 36 Cal.4th at p. 163.) We construe the Supreme Court's word "cheat" in light of Civil Code section 1668, which prohibits clauses that exempt the contracting party from liability for *fraud or willful injury*.

Here, the complaint expressly alleges fraud and deceit by AT&T Wireless in that the customers were charged a fee for phone number portability even though portability was not yet available. Pursuant to the rule of *Discover Bank*, we conclude that the class arbitration ban effectively operates to exculpate AT&T Wireless from responsibility for its own willful injury to a large class of consumers, and the class arbitration ban is thereby unconscionable.

It bears emphasizing that a finding of unconscionability in a contract clause does not necessarily mean that the contract cannot be enforced. The trial court has discretion to sever the unconscionable provision and enforce the remainder of the contract or to limit the application of the unconscionable clause so as to avoid an unconscionable result. (Civ.Code, § 1670.5, subd. (a); *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1074-1075.) "If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." (*Armendariz, supra*, 24 Cal.4th at p. 124.) AT&T Wireless has not argued in this case that the class arbitration ban is an integral part of the arbitration agreement such that it cannot be severed. In fact, in connection with other asserted defects in the arbitration agreement (provisions on cost allocation and debt collection), AT&T Wireless argues that the offending provisions could be severed to allow the arbitration agreement to be enforced. We will remand the matter to the trial court for an exercise of its discretion on whether the class arbitration ban should be severed and the

remainder of the arbitration agreement enforced. AT&T Wireless retains the option of withdrawing its petition to compel arbitration and allowing the matter go to class litigation. (See *Discover Bank*, *supra*, 36 Cal.4th at p. 173, fn. 8.)

III. Waiver

Plaintiff Bucy argues that AT&T Wireless waived its right to compel arbitration by delaying its petition to compel for eight months until after certain preliminary proceedings had been completed. The trial court rejected the argument, and we review the determination on waiver under the substantial evidence rule. (*Engalla v. Permanente Medical Group, Inc.*, *supra*, 15 Cal.4th at p. 983; *Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1195, 1198.)

The record contains ample support for the trial court's finding that waiver was not established. The fact that AT&T Wireless removed the lawsuit to federal court and then unsuccessfully resisted remand back to state court does not provide a basis for waiver. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1205 [venue efforts provide no basis for waiver of arbitration].) Nor does the fact that plaintiff incurred expenses in the proceedings constitute the prejudice that gives rise to waiver. (*Ibid.*; *Groom v. Health Net*, *supra*, 82 Cal.App.4th at p. 1197.) Plaintiff Bucy made no showing that the delay adversely affected his ability to have his claims resolved fairly in arbitration. There is no indication that AT&T Wireless took advantage of judicial discovery procedures not available in arbitration in order to gain information about plaintiff's case. In the absence of any showing to prejudice to plaintiff, the trial court properly found that the delay by AT&T Wireless did not result in a waiver. (*St. Agnes Medical Center v. PacifiCare of California*, *supra*, 31 Cal.4th at pp. 1203-1205; *Groom v. Health Net*, *supra*, 82 Cal.App.4th at pp. 1195-1198.)

DISPOSITION

The order denying arbitration is reversed insofar as it is based upon a finding that no arbitration agreement exists. The matter is remanded to the trial court for further proceedings on whether the unconscionable ban on class-wide arbitration should be severed from the remainder of the arbitration agreement. Costs are awarded to respondent.

We concur: STEVENS and SIMONS, JJ.

Court of Appeal,
First Appellate District, Division Five – No. A105910
S138746

IN THE SUPREME COURT OF CALIFORNIA

En Banc

WILLIAM BUCY,
Plaintiff and Appellant,

v.

AT&T WIRELESS SERVICES INCORPORATED,
Defendant and Appellant.

Filed December 14, 2005

Application for stay and petition for review DENIED.

/s/ GEORGE
Chief Justice

JOSEPH W. COTCHETT (#36324)
BRUCE L. SIMON (#96241)
NANCY L. FINEMAN (#124870)
PETER E. BORKON (#212596)
SHERI L. KELLY (#226993)
COTCHETT, PITRE, SIMON & MCCARTHY
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone (650) 697-6000

GEORGE COREY (#34580)
DARIO DE GHETALDI (#126782)
COREY, LUZAICH, PLISKA,
DE GHETALDI & NASTARI, LLP
700 El Camino Real, P.O. Box 669
Millbrae, CA 94030
Telephone (650) 871-5666

Attorneys for Plaintiffs and the Class

Filed:
March 16, 2004

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

WILLIAM BUCY, MICHAEL C. MITCHELL, JAIME WING, both individually and on behalf of all those similarly situated	) Case No. Civ 432021)) *CLASS ACTION*)
Plaintiffs,	) ~~[PROPOSED]~~ ORDER DENYING) DEFENDANT AT&T WIRELESS) SERVICES, INC.'S PETITION) FOR ORDER COMPELLING
vs.	) ARBITRATION AND MOTION
AT&T WIRELESS SERVICES, INC., CINGULAR WIRELESS LLC, SPRINT SPECTRUM L.P., and DOES 1-25;	) FOR STAY)) DATE: MARCH 11, 2004) TIME: 9:00 AM) DEPT.: 1
Defendants.	) JUDGE: HON. CAROL L. MITTLESTEADT

Defendant AT&T Wireless Services, Inc.'s ("AT&T Wireless") Petition for Order Compelling Arbitration and Motion for Stay came on regularly for hearing on March 11, 2004 before this Court, the Hon. Carol L. Mittlesteadt, pre-

siding. Nancy L. Fineman and Peter E. Borkon of Cotchett, Pitre, Simon & McCarthy appeared on behalf of Plaintiffs and the Class; Brian L. Ferrall of Keker & Van Nest appeared on behalf of AT&T Wireless. The Court has reviewed the motion, opposition, reply thereto and considered oral argument from the parties, and good cause appearing therefore, DENIES Defendant AT&T Wireless' Petition for Arbitration and Motion for Stay for the following independent reasons:

1. The Court finds that AT&T Wireless failed to meet its burden in demonstrating that there was an agreement to arbitrate between Plaintiff William Bucy ("Bucy") and AT&T Wireless.

2. The Court further finds as an independent basis for its decision that the alleged arbitration agreement is unconscionable. The agreement is procedurally unconscionable because it was presented to Bucy on a take it or leave it basis. *See Flores v. Transamerica Homefirst, Inc.* (2001) 93 Cal.App.4th 846, 853. The agreement is substantively unconscionable because the contract terms are one-sided in AT&T Wireless' favor, including the fact that AT&T Wireless has the right to pursue claims for the collection of debts against Bucy in court, but Bucy does not have a bilateral right to pursue claims against AT&T Wireless in court. *Id.* at 854; *see also Armendariz v Foundation Health PsychCare Services, Inc.* (2000) 24 Cal.4th 83, 117-118. The Court also finds that the agreement is substantively unconscionable because it prohibits arbitrations to be brought on a class-wide or representative basis. *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094. The Court finds it manifestly unjust not to allow consumers to bring arbitrations on a class-wide or representative basis. Since AT&T Wireless concedes, at page 10:9-12 of its Petition, that the class prohibition cannot be severed from the alleged arbitration agreement, the entire agreement is unconscionable. *Armendariz*, 24 Cal.4th at 124-125.

3. AT&T Wireless' Motion for Stay is Moot.

Having applied the aforementioned reasoning and considering the facts herein Defendant AT&T Wireless' Petition to Compel Arbitration and Motion to Stay are DENIED.

IT IS SO ORDERED

DATED: MARCH 12, 2004

/S/ CAROL L. MITTLESTEADT
Hon. Carol L. Mittlesteadt
Judge of the Superior
Court of California

APPROVED AS TO FORM.

KEKER & VAN NEST, LLP

/S/ BRIAN L. FERRALL
Brian L. Ferrall
Attorneys for Defendant
AT&T Wireless

Court of Appeal,
First District, Division 5, California.

WILLIAM BUCY, ET AL.,
Plaintiffs and Respondents,

v.

AT&T WIRELESS SERVICES, INC.,
Defendant and Appellant.

No. A105910.

(San Mateo County Super. Ct. No. 432021).

May 18, 2005.

Bruce Lee Simon, Cotchett & Pitre, Burlingame, CA, for Plaintiffs and Respondents.

Steven Arthur Hirsch, Daniel Erin Jackson, Keker & Van Nest, San Francisco, CA, for Defendant and Appellant.

JONES, P.J.

Plaintiff William Bucy and two coplaintiffs, Michael Mitchell and Jaime Wing, filed suit against AT&T Wireless and other wireless service providers to challenge the practice of charging customers a fee for local number portability. Of the three named plaintiffs, only Bucy is a customer of AT&T Wireless. AT&T Wireless petitioned to compel arbitration of plaintiff Bucy's claims based upon an arbitration clause included among the terms and conditions of the wireless service agreement.[1] AT&T Wireless appeals from the order denying arbitration. We will reverse the order.

---

[1] The plaintiffs' lawsuit named two other wireless service providers as well, but this appeal concerns only AT&T Wireless. Appeals by the other service providers arising from the same lawsuit are pending before us in *Mitchell v. Sprint*, A105911 and *Wing v. Cingular*, A105906. AT&T sought to compel arbitration only by

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff first became a subscriber of AT&T Wireless in October 2001 when AT&T acquired his account from Bay Area Cellular Telephone Corporation (dba Cellular 1). At that time, plaintiff was sent a welcome guide that contained that the terms and conditions of AT&T's wireless service. After 2001, Bucy changed his rate plan several times, most recently in March 2003, when he entered into a one-year service agreement subject to a new set of written terms and conditions.

The terms and conditions of AT&T's wireless service agreement include an arbitration clause calling for the arbitration of all disputes arising out of "our relationship." Notwithstanding the agreement to arbitrate all disputes, the customer retains the right to bring an action in small claims court, and both parties may litigate debt collection matters.

The arbitration clause allows only individual claims to be heard in arbitration. The provision states: "An arbitrator ... may not order relief on a consolidated, class wide or representative basis." Further, the arbitration clause provides: "[A]ny arbitration will be conducted on an individual basis and not on a consolidated, class wide, or representative basis."

The arbitration agreement sets up a three-tiered system for allocation of costs. If the customer's claim is for less than $1,000, the customer must pay a fee of $25, and AT&T will pay the balance of administrative fees and costs. If the customer's claim is between $1,000 and $75,000, then the customer must share in the costs of arbitration, but need pay no more than the equivalent court filing fee. And, if the claim is

---

plaintiff Bucy because Bucy is the only named plaintiff who is an AT&T Wireless customer.

in excess of $75,000, then all administrative costs and expenses will be divided equally.

In April 2003, AT&T Wireless began charging its customers a "Regulatory Programs Fee" that included a fee for local number portability, even though a portability program had never been implemented. In June 2003, plaintiff Bucy and his two coplaintiffs brought a class action alleging unfair business practices under the Unfair Competition Law (UCL) (Bus. & Prof.Code, § 17200 et seq.), violations of the False Advertising Act (Bus. & Prof.Code, § 17500 et seq.), fraud, breach of contract, and breach of the implied covenant of good faith and fair dealing.

Based upon the arbitration clause in its wireless service agreement, AT&T petitioned to compel arbitration of plaintiff Bucy's claim. Plaintiff opposed the petition, arguing that the arbitration clause was procedurally and substantively unconscionable. Plaintiff also questioned the existence of an arbitration agreement, asserting that he had never signed any written contract with Cellular 1 containing an arbitration clause and he was not alerted to the arbitration clause in the welcome guide from AT&T Wireless.

The trial court identified two reasons for denying AT&T's petition to compel arbitration. First, the court found that AT&T Wireless failed to prove an agreement to arbitrate. Second, the court found that even if an arbitration agreement exists the agreement is unconscionable. In particular, the court found the arbitration agreement procedurally unconscionable, having been presented on a take-it-or-leave-it basis. Further, the court found the ban on class-wide arbitration to be substantively unconscionable.

DISCUSSION

I. Existence of Arbitration Agreement

An order compelling arbitration is warranted only upon a finding that "an agreement to arbitrate the controversy exists." (Code Civ. Proc., § 1281.2.) General principles concerning the formation of a contract govern this threshold issue. (*Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.* (1998) 68 Cal.App.4th 83, 88-89.) The appellate court will uphold the trial court's finding on the existence of an arbitration agreement when substantial evidence supports that finding. (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 357.) However, when, as here, the evidence consists entirely of written declarations and documentary evidence, we make a de novo determination of whether the parties agreed to arbitrate their disputes. (68 Cal.App.4th at p. 89.) We conclude that an agreement to arbitrate exists.

The evidence was undisputed that Bucy entered into an agreement with AT&T Wireless for the provision of wireless service. Bucy admitted in his complaint that he is a customer of AT&T Wireless, and he admitted in his declaration that he had filled out a form when he signed up for service with Cellular 1, which was later taken over by AT&T Wireless. The complaint expressly alleges that plaintiffs "*entered into written contracts* with Defendants wherein Defendants promised to provide wireless telephone service to Plaintiffs ... in exchange for ... a monthly fee. Each of these contracts were form adhesion contracts which included the same material terms." (Italics added.) Indeed, the causes of action for breach of contract and breach of implied covenant of good faith rest upon the existence of a contract.

AT&T Wireless presented as evidence a copy of the written "Terms and Conditions" for Bucy's most recent wireless service agreement. Plaintiff does not dispute that the terms

and conditions include an arbitration clause. Plaintiff contends that he never assented to those terms and conditions.

Certainly a contract is not formed without mutual assent. (Civ.Code, §§ 1550, 1565; *Windsor Mills, Inc. v. Collins & Aikman Corp.* (1972) 25 Cal.App.3d 987, 993.) However, the existence of mutual assent is determined by objective criteria, not by one party's subjective intent. The test is whether a reasonable person would, from the conduct of the parties, conclude there was a mutual agreement. (*Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1050.)

This is not a case in which the contractual nature of the document was not obvious to an unsuspecting customer. (Cf. *Windsor Mills, Inc. v. Collins & Aikman Corp.*, *supra*, 25 Cal.App.3d at pp. 993-994.) The opening paragraph of the terms and conditions states: "Get the most out of your wireless service by knowing the terms of your Agreement with us. PLEASE READ THESE TERMS AND CONDITIONS CAREFULLY. They govern the relationship between you and AT&T Wireless and explain our respective legal rights concerning all aspects of our relationship, including ...:[¶] Resolution of past or future disputes by arbitration instead of court trials and class actions." (Capitalization in original.) The document goes on to state in all capital letters that by using the wireless service "you consent to the terms and conditions set forth in this agreement. If you do not agree with these terms and conditions ... do not use the service or device and notify us immediately to cancel service and/or return the equipment...."

Plaintiff acknowledged in his complaint that the terms and conditions packet was part of the wireless service agreement. The complaint alleges that, "The section of the 'Terms and Conditions' to the [AT&T] service contract yields no mention of the Regulatory Programs Fee." His only evidence to refute the binding effect of those Terms and Conditions

was his declaration: "I do not believe I got a contract from AT&T [in October 2001] when they started to provide my wireless phone service." Whether or not Bucy recognized the welcome guide he was sent in 2001 as a "contract" is irrelevant in light of the uncontroverted evidence that Bucy entered into a new contract in March 2003 subject to the terms and conditions. Those terms and conditions give the customer 15 days in which to review the terms and cancel the agreement. Plaintiff obviously continued to use the wireless service after March 2003; according to the complaint filed in June 2003, he remains an AT&T customer.

Certainly the wireless service agreement was a contract of adhesion—a standardized contract imposed upon the subscriber without any opportunity to negotiate the terms. (See generally, *Neal v. State Farm Ins. Co.* (1961) 188 Cal.App.2d 690, 694; accord *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113; *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 817.) However, a contract of adhesion is nonetheless a valid and existing contract. (*Graham v. Scissor-Tail, Inc., supra*, 28 Cal.3d at p. 819.) Such contracts "are, of course, a familiar part of the modern legal landscape.... They are also an inevitable fact of life for all citizens— businessman and consumer alike." (*Id.* at pp. 817-818, fns. omitted.) A finding of adhesion merely begins another inquiry—whether a particular provision within the contract should be denied enforcement on the ground that it is unconscionable. (*Id.* at pp. 819-827; see *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc., supra*, 89 Cal.App.4th at p. 1056.)

II. Unconscionability

An agreement to arbitrate is valid, irrevocable, and enforceable except when grounds exist for the revocation of

any contract. (Code Civ. Proc., §§ 1281, 1281.2, subd. (b).)[2] Unconscionability is one ground upon which a court may refuse to enforce a contract (Civ.Code, § 1670.5), and the burden is on the party opposing arbitration to prove the defense. (*Engalla v. Permanente Medical Group, Inc., supra,* 15 Cal.4th at p. 972.)

The determination of unconscionability is a question of law for the court. (Civ.Code, § 1670.5, subd. (a); *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 851.) On appeal, when the extrinsic evidence is undisputed, as it is here, we review the contract de novo to determine unconscionability. (93 Cal.App.4th at p. 851; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1527.)

In determining whether a particular contractual provision is unconscionable, we examine both a procedural and a substantive element of unconscionability. The *procedural* element focuses on the way in which the disputed provision was presented—i.e., whether there was "oppression" or "surprise." Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them. The substantive element of unconscionability has to do with the effects of the contractual provision and whether it is overly harsh or one-sided. (*Armendariz v. Foundation Health Psychcare Services, Inc* (2000) 24 Cal.4th 83, 114; *A & M*

---

[2] The statutory reference to grounds for *revocation* of an agreement is a misnomer; the issue on a motion to compel arbitration is whether there are grounds to *rescind* the arbitration agreement. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973.)

Produce Co. v. FMC Corp. (1982) 135 Cal.App.3d 473, 486.)

To be unenforceable, a contract must be both procedurally and substantively unconscionable, but the courts employ a "sliding scale" or a balancing relationship between the two elements of unconscionability, such that the greater the degree of unfair surprise or unequal bargaining power, the less the degree of substantive unconscionability required to annul the contract and vice versa. (*Armendariz, supra*, 24 Cal.4th at p. 114; *Marin Storage & Trucking, Inc., supra*, 89 Cal.App.4th at p. 1056.)

The terms and conditions of the wireless service agreement here were presented on a take-it-or-leave-it basis, first mailed to plaintiff as a welcome guide and then provided as a packet accompanying his new wireless service contract. We agree with the trial court's conclusion that the wireless service agreement was a contract of adhesion and, hence, procedurally unconscionable. (See *Flores v. Transamerica HomeFirst, Inc., supra*, 93 Cal.App.4th at p. 853; Stirlen v. Supercuts, Inc., supra, 51 Cal.App.4th at pp. 1533-1534.) The more difficult question is whether the arbitration clause is substantively unconscionable.

A. Debt Collection Exception

The arbitration clause provides two exceptions to the agreement to submit disputes to arbitration: "(1) you may take claims to small claims court if they qualify for hearing by such a court, or (2) you or we may choose to pursue claims in court if the claims relate solely to the collection of any debts you owe to us." The trial court found that in allowing AT&T Wireless to bring debt collection actions in court the arbitration agreement was so one-sided as to be substantively unconscionable.

The lack of mutuality is, of course, a basis for finding substantive unconscionability. (*Armendariz, supra*, 24

Cal.4th at pp. 117-121.) The courts have found unconscionable a clause requiring arbitration for the weaker party while giving the stronger party a choice of forum. (*Id.* at pp. 120-121 [only employee's claims of wrongful termination subject to arbitration]; *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1073 [allowing appeal of any award over $50,000 effectively gave only employer right to appeal]; *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1407-1408 [personal injury damages not available without contractor's consent]; *Flores v. Transamerica HomeFirst, Inc., supra*, 93 Cal.App.4th at p. 855 [only borrower's claims subject to arbitration while lender had remedy of foreclosure].)[3]

In *Flores v. Transamerica HomeFirst, Inc., supra*, 93 Cal.App.4th 846, we held an arbitration clause in a reverse mortgage loan agreement to be unconscionable where the borrowers were required to arbitrate any controversy arising out of the loan agreement while the lender was free to proceed by judicial or nonjudicial foreclosure, by self-help remedies such as setoff, and by injunctive relief to obtain appointment of a receiver. (*Id.* at pp. 854- 855.) We observed that "[a]s a practical matter, by reserving to itself the remedy of foreclosure, [the lender] has assured the availability of the only remedy it is likely to need." (*Id.* at p. 855.)

The arbitration clause here is markedly different. While AT&T has reserved the right to bring debt collection matters to court, that right belongs to the customer, too (e.g., on a declaratory relief action to challenge an assertedly improper charge). Moreover, the customer is free to pursue any claim

---

[3] Not every instance of one-sidedness is invalid: "[A] contract can provide a 'margin of safety' that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need without being unconscionable." (*Stirlen v. Supercuts, Inc., supra*, 51 Cal.App.4th at p. 1536; accord, *Armendariz, supra*, 24 Cal.4th at p. 117.)

in small claims court. Because we have concluded that the arbitration may properly proceed on an individual and not a class-wide basis, we find it improbable that any particular customer would have a claim exceeding the $5,000 jurisdictional limit for small claims court (Code Civ. Proc., § 116.220, subd. (a)(1).) Under the circumstances, we cannot say that the arbitration clause lacks the requisite "modicum of bilaterality." (*Armendariz, supra*, 24 Cal.4th at p. 117.)

In any event, even if we were to conclude that the debt collection exception is unfairly one-sided, the arbitration clause could still be enforced. The trial court has authority to sever an unconscionable provision and enforce the remainder of the contract or to limit the application of the unconscionable clause so as to avoid an unconscionable result. (Civ.Code, § 1670.5, subd. (a); *Little v. Auto Stiegler, Inc., supra*, 29 Cal.4th at pp. 1074-1075.) "If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." (*Armendariz, supra*, 24 Cal.4th at p. 124.) Here, the debt collection exception is a single, discrete provision that is not integral to the arbitration agreement. The offending provision can be stricken without affecting the rest of the arbitration agreement and without affecting the current proceedings, which do not involve a debt collection matter.

B. Ban on Class Arbitration

In *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094 (*Szetela*), the court held an arbitration clause prohibiting class-wide arbitration to be unconscionable and unenforceable.[4] In that case, the plaintiff was a credit card holder who

---

[4] The issue is pending before the California Supreme Court in *Discover Bank v. Superior Court*, review granted April 9, 2003

alleged that the bank (credit card company) had improperly charged him a $29 fee for exceeding his credit limit. The arbitration clause in the credit card agreement prohibited joining or consolidating claims in arbitration or arbitrating claims as a representative, as a member of a class, or as a private attorney general. When the plaintiff brought a class action, the bank successfully moved to compel arbitration on an individual basis. The appellate court held the ban on class treatment to be unconscionable, and the court directed the trial court to proceed to arbitration on a class basis.

The *Szeleta* court reasoned that the ban on class arbitration was unfairly one-sided: "Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover, because credit card companies typically do not sue their customers in class action lawsuits. This provision is clearly meant to prevent customers ... from seeking redress for relatively small amounts of money, such as the $29 sought by Szeleta. Fully aware that few customers will go to the time and trouble of suing in small claims court, Discover has instead sought to create for itself virtual immunity from class or representative actions despite their potential merit, while suffering no similar detriment to its own rights." (*Szeleta*, *supra*, 97 Cal.App.4th at p. 1101.)

In the present case, the ban on class-wide arbitration does tend to favor AT&T Wireless. The obvious effect is to limit the scope of potential damages that AT&T Wireless would face in class arbitration without the ability to obtain judicial review. Yet, the ban on class arbitration does not affect the choice of forum. Class actions through *litigation* are necessarily precluded by the agreement to arbitrate. The limitation

---

(S113725), and *Mandel v. Household Bank*, review granted April 9, 2003 (S113699).

is only on the breadth of the arbitration proceeding—i.e., the *manner* in which the arbitration is to occur. And the limitation in the present case is materially different from the clause in *Szetela*. The arbitration clause here expressly permits the customer to obtain relief in small claims court.[5] Moreover, the cost to the customer is limited to $25 on claims under $1,000; AT&T will pay all other administrative costs and fees. In contrast to the credit card customers in *Szetela*, AT&T's subscribers are not deterred from seeking redress for small amounts. And for larger claims between $1,000 and $75,000, the customer need pay no more for arbitration costs than the equivalent of a court filing fee. Under these circumstances, we do not find the arbitration clause so one-sided or unreasonable to be substantively unconscionable.

Our analysis does not end there, however. The Supreme Court has recognized two distinct defenses to a motion to compel arbitration: (1) the arbitration agreement is unconscionable, and (2) arbitration would compel the claimant to forfeit certain statutory rights. (*Armendariz*, *supra*, 24 Cal.4th at p. 113; *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 86.) The parties here have not made a distinction between the two defenses but have treated the latter as a version of unconscionability. We treat the two defenses separately.

It is now well settled that even claims arising under a statute designed to further important social policies may be arbitrated. (*Green Tree Fin. Corp.-Ala. v. Randolph* (2000) 531 U.S. 79, 90; *Cruz v. PacifiCare Health Systems, Inc.*,

---

[5] Oddly, the *Szetela* court seems to have presumed that the credit cardholders were free to go to small claims court but would be unlikely to do so. Yet, the arbitration clause in that case withdrew the right to litigate any claim in court. (*Szeleta*, *supra*, 97 Cal.App.4th at p. 1096.)

supra, 30 Cal.4th at p. 317 [UCL and False Advertising Act]; *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1084 [Consumer Legal Remedies Act].) But arbitration will be denied if the prospective litigant is precluded from fully vindicating the statutory cause of action in the arbitral forum. (531 U.S. at p. 90; *Armendariz*, *supra*, 24 Cal.4th at pp. 99-104.) In *Armendariz*, the claimant/employees sued for sexual harassment under FEHA, but the arbitration clause in their employment contract confined the potential relief to back pay and precluded recovery of punitive damages and attorney fees—recovery that would otherwise have been available under FEHA. The Supreme Court held the limitation on remedies was unlawful as it would prevent the employees' full vindication of their rights under FEHA. (See also *Stirlen v. Supercuts, Inc.*, *supra*, 51 Cal.App.4th at pp. 1539-1540 [limit on remedies under several statutes]; *Graham Oil v. ARCO Products Co.* (9th Cir.1995) 43 F.3d 1244, 1248 [limit on remedies that would be available under Petroleum Marketing Practices Act].)

The *Szeleta* court apparently relied upon this principle in finding that the contractual ban on class arbitration violates public policy. The *Szeleta* court reasoned that the ban would undermine consumer protection statutes by eliminating the private attorney general mechanism: "[The clause] contradicts the California Legislature's stated policy of discouraging unfair and unlawful business practices, and of creating a mechanism for a representative to seek relief on behalf of the general public as a private attorney general. (See, e.g., Bus. & Prof.Code, § 17200 et seq.) It provides the customer with no benefit whatsoever; to the contrary, it seriously jeopardizes customers' consumer rights by prohibiting any effective means of litigating Discover [Bank's] business practices. This is not only substantively unconscionable, it violates public policy by granting Discover [Bank] a 'get out of jail

free' card while compromising important consumer rights." (*Szeleta, supra*, 97 Cal.App.4th at p. 1101.)

We cannot agree that the ban on class arbitration immunizes businesses from consumer protection lawsuits. The arbitration clause has no effect on actions by the Attorney General or other governmental prosecutors to redress unfair business practices. (*EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279; see *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 32.) Nor does the ban on class arbitration do anything to limit litigation. The customer's right to litigate has already been curtailed by the arbitration agreement itself. As we have said, plaintiff's monetary claims under the UCL and False Advertising Act are arbitrable even though such claims vindicate important statutory rights.[6] What is restricted here is the breadth or manner of arbitration and the ability to pursue the claims of others within the arbitration.

There is no statutory right to class arbitration. Class arbitration has been held *permissible* when the trial court, in the exercise of its discretion, finds that the interests of justice require class-wide relief. (*Keating v. Superior Court* (1982) 31 Cal.3d 584, 609-614, reversed on other grounds *sub nom. Southland Corp. v. Keating* (1984) 465 U.S. 1; *Blue Cross of California v. Superior Court* (1998) 67 Cal.App.4th 42, 64; see *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S.

---

[6] The California Supreme Court has held that claims under the UCL for *injunctive relief* to benefit the general public are not arbitrable. (*Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 315-316; see also *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1079-1082 [claims for injunctive relief under the Consumer Legal Remedies Act].) AT&T Wireless did not dispute plaintiff's argument below that the claims for injunctive relief are not arbitrable. The only question before us, then, is whether plaintiff's claims for monetary damages and restitution of the local number portability fees are arbitrable.

444; *Cruz v. PacifiCare Health Systems, Inc.*, *supra*, 30 Cal.4th at pp. 318-319.) However, judicial recognition of a class-wide remedy in arbitration cannot be equated with a nonwaivable statutory right. Indeed, a nonwaivable right to class arbitration would undermine the purpose of arbitration. Arbitration is meant to resolve *private* disputes in an expeditious and efficient manner, not to remedy a public wrong. (*Broughton v. Cigna Healthplans*, *supra*, 21 Cal.4th at p. 1080.) The fact that the procedural device of class treatment is not available in arbitration is "part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition' [citing *Gilmer v. Interstate/Johnson Lane Corp.*, *supra*, 500 U.S. at p. 31], characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims." (*Iberia Credit Bureau, Inc. v. Cingular Wireless* (5th Cir.2004) 379 F.3d 159, 174.)

III. Waiver

Plaintiff Bucy argues that AT&T Wireless waived its right to compel arbitration by delaying its petition to compel for eight months until after certain preliminary proceedings had been completed. The trial court rejected the argument, and we review the determination on waiver under the substantial evidence rule. (*Engalla v. Permanente Medical Group, Inc.*, *supra*, 15 Cal.4th at p. 983; *Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1195, 1198.)

The record contains ample support for the trial court's finding that waiver was not established. The fact that AT&T Wireless removed the lawsuit to federal court and then unsuccessfully resisted remand back to state court does not provide a basis for waiver. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1205 [venue efforts provide no basis for waiver of arbitration].) Nor does the fact that plaintiff incurred expenses in the proceedings constitute the prejudice that gives rise to waiver. (*Ibid.*; *Groom v. Health Net*, *supra*, 82 Cal.App.4th at p.

1197.) Plaintiff Bucy made no showing that the delay adversely affected his ability to have his claims resolved fairly in arbitration. There is no indication that AT&T Wireless took advantage of judicial discovery procedures not available in arbitration in order to gain information about plaintiff's case. In the absence of any showing of prejudice to plaintiff, the trial court properly found that the delay by AT&T Wireless did not result in a waiver. (*St. Agnes Medical Center v. PacifiCare of California*, *supra*, 31 Cal.4th at pp. 1203-1205; *Groom v. Health Net*, *supra*, 82 Cal.App.4th at pp. 1195-1198.)

DISPOSITION

The order denying arbitration is reversed, and the trial court is directed to enter a new order compelling arbitration of the monetary claims on an individual basis. The parties shall bear their own costs on appeal.

We concur: STEVENS and SIMONS, JJ.

Court of Appeal,
First Appellate District, Division Five – No. A105910
S135065

IN THE SUPREME COURT OF CALIFORNIA

En Banc

WILLIAM BUCY,
Plaintiff and Respondent,

v.

AT&T WIRELESS SERVICES,
Defendant and Appellant.

Filed August 24, 2005

Petition for review GRANTED.

The matter is transferred to the Court of Appeal, First Appellate District, Division Five, with directions to vacate its decision and to reconsider the matter in light of *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148.

/s/ GEORGE
Chief Justice

/S/ KENNARD
Associate Justice

/S/ BAXTER
Associate Justice

/S/ WERDEGAR
Associate Justice

/S/ CHIN
Associate Justice

/S/ MORENO
Associate Justice